

STATE OF NEW HAMPSHIRE
WATER COUNCIL

RECEIVED

Docket No. 03-10 WC

JUL 25 2005

Appeal of the Conservation Law Foundation
In re: Water Quality Certificate No. 2003-001

DEPARTMENT OF ENVIRONMENTAL SERVICES
OBJECTION TO THE CONSERVATION LAW FOUNDATION'S
MOTION TO COMPEL

NOW COMES the New Hampshire Department of Environmental Services ("Environmental Services" or "DES"), by and through counsel, the Office of the Attorney General, and objects to the Conservation Law Foundation's ("CLF") Motion to Compel, stating as follows:

1. CLF seeks to compel depositions and responses to interrogatories in this matter, which is scheduled for hearing on August 10, 2005.
2. Although the Council has authority to conduct evidentiary hearings, the scope of review is limited to whether the DES decision was arbitrary and capricious, or contrary to statute or rules. Env-Wc 204.16(a). Thus, the evidence will consist primarily of material from the DES file.
3. The Council's rules make no reference to interrogatories or depositions.
4. Pursuant to the Council's June 15, 2005 order, DES has filed its witness and exhibit list and served it on counsel for the other parties. All of the State's exhibits have been, or shortly will be, made available to the other parties.
5. Further, in response to CLF's request that the State treat its interrogatories as a public information request under RSA 91-A, counsel for the State has made the DES file

available for review and is in the process of reviewing the electronic files with respect to this matter. See attached Exhibit A (Jennifer J. Patterson's July 15th letter to Thomas F. Irwin).

6. CLF will shortly be in possession of all documents, with the exception of attorney-client privileged materials, relating to DES's consideration of the Falls Way 401 application. There is no need for further discovery. Conducting depositions would be burdensome and time-consuming, and is not authorized by any rule or statute. The New Hampshire Supreme Court has held that depositions of agency staff are not required in administrative proceedings, where cross-examination is available. Appeal of Portsmouth Savings Bank, 123 N.H. 1, 5 (1983) (administrative hearings should not be turned into "mini trials").

7. The fact that discovery may have been conducted in prior Council hearings by agreement of the parties does not give the Council authority to compel discovery not contemplated under the Council's rules.

WHEREFORE, DES requests that the Water Council:

- A. Deny CLF's Motion to Compel, and
- B. Grant such other relief as may be just.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

Kelly A. Ayotte
Attorney General

Jennifer J. Patterson
Senior Assistant Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, New Hampshire 03301
(603) 271-3679

Date: July 21, 2005

COPY


CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Department of Environmental Services Objection to the Conservation Law Foundation's Motion to Compel* was forwarded via first-class mail, postage prepaid, to counsel of record, Thomas F. Irwin, Esquire and Malcolm McNeill, Esquire.

COPY

Jennifer J. Patterson

EXHIBIT A

**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

KELLY A. AYOTTE
ATTORNEY GENERAL



MICHAEL A. DELAN
DEPUTY ATTORNEY GENERAL

VIA FAX & FIRST CLASS US Mail

July 15, 2005

Thomas F. Irwin, Esquire
Conservation Law Foundation
27 North Main Street
Concord, New Hampshire 03301

Re: *Conservation Law Foundation Appeal*
Docket No. 03-10 WC

Dear Tom:

I am writing in response to your July 12, 2005 letter, as well as your recent request for stipulations. We also discussed these issues in detail by phone today.

Depositions: As I noted in my July 11 letter, the Water Council rules do not provide for formal discovery or informal information exchange. Thus, depositions are available only by agreement of the parties. I do not see any reason to agree to depositions in this case.

Stipulations: I forwarded your draft stipulations to the Department of Environmental Services ("DES") for review. The agency staff felt the proposed stipulations were overly broad and generalized. Rather than stipulating, we would prefer to address these issues at the hearing where the DES staff will be able to explain how the water quality standards relate to the precise proposal at issue.

91-A Request: In your July 12 letter, you asked that your interrogatories, to which I objected, be treated as a 91-A request. Under an amendment that took effect last summer, personal notes and preliminary drafts are exempt from disclosure under RSA chapter 91-A. RSA 91-A:5, VIII and IX, effective August 14, 2004. Even prior to the effective date of these provisions, the deliberative process privilege arguably barred disclosure of such documents. However, in the interest of moving this matter forward, the state is willing to disclose personal notes, preliminary drafts and similar documents contained in DES's Falls Way 401 project-specific file, with the exception

Letter to Mr. Thomas F. Irwin
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of documents subject to attorney-client privilege. In making this disclosure, the state does not waive any privilege or exemption with respect to any other type of document or any other file, including but not limited to the rulemaking files discussed further below.

In response to the 91-A request, I have reviewed the paper file at DES with respect to the 401 certification for the Falls Way project. To the best of my knowledge, the only paper documents responsive to your request which you have not previously viewed are the two enclosed sets of handwritten notes, dated June 20, 2003 and July 1, 2003. I believe these notes were taken by Paul Piszczek. As I mentioned on the phone, we are withholding two documents on the basis of attorney-client privilege. These consist of a one-page handwritten meeting note concerning a meeting with me, and a memorandum from me to DES.

I also asked DES for electronic documents on the Falls Way 401 certification. In response, I received a CD-ROM containing what appear to be several drafts of the 401 certification, electronic copies of the correspondence sent by DES in this matter, and two internal memos analyzing the proposal. In addition, there are copies of e-mails which I have not yet reviewed. Contrary to what I said on the phone, it appears that these e-mails do include some from 2003. I will provide copies of the electronic materials to you next week, once I have had the opportunity to review them. I will not object to your adding any of these electronic materials to your exhibit list after the July 18 deadline, given that you have not yet seen them. Meanwhile, you are welcome to contact DES directly to set up an appointment to review the paper file; however, please do not engage in substantive discussion of the case with the staff.

In addition, you had asked for documents relating to readoption of the expired 401 procedural rules. I do not believe DES is required under RSA 91-A to provide any documents in response to this request. Both the former rules and the interim rules (which were identical to the former rules) have expired. I understand that DES is in the process of internally deliberating on a revised version of the rules; however, I have not been involved in this process and I do not believe any drafts of these rules have been made public. "Preliminary drafts, notes, and memoranda and other documents not in their final form" are not subject to disclosure under chapter 91-A. RSA 91-A:5, IX. Therefore, I am not providing any documents in response to this portion of your request.


Finally, during our phone conversation we attempted to reach Water Council Clerk Michael Sclafani with respect to whether the Council would be considering the issue on which we submitted legal memoranda (expiration of the procedural rules)

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prior to the August 10 hearing. The call was prompted by the cancellation of the Council's July meeting. Mr. Sclafani did call me back and is in the process of following up on this issue. If I hear more about this, I will let you know.

Thank you for your ongoing cooperation in this matter, and please do not hesitate to contact me if you have further questions.

Very truly yours,


COPY
Jennifer J. Patterson
Senior Assistant Attorney General
Environmental Protection Bureau
(603) 271-3679

JJP/cmc

cc: Malcolm R. McNeill, Jr., Esquire
Paul Currier, Administrator IV, Watershed Management Bureau